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FILED
OCT 29 1959
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM

1959

WILLIAM BROCKMUELLER,
Petitioner,

vs.

THE STATE OF ARIZONA,
Respondent.

No. 476

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

LESLIE C. HARDY
Chief Assistant
Attorney General
of the
State of Arizona
108 Capitol Building
Phoenix, Arizona
COUNSEL FOR RESPONDENT

WADE CHURCH
The Attorney General
of the State of Arizona

FRANKLIN K. GIBSON
Assistant Attorney General
of the State of Arizona
OF COUNSEL

In the Supreme Court of the United States

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No.....

WILLIAM BROCKMUELLER, Petitioner

v.

THE STATE OF ARIZONA, Respondent

OPINION BELOW

The opinion in this case was delivered by the Supreme Court of the State of Arizona on June 17, 1959, and is entitled "William Brockmueller, Appellant, vs. State of Arizona, Appellee". It is numbered 1133 and is reported in 86 Ariz....., 340 P. 2(d) 992 (Advance Pamphlet No. 3, August 7, 1959). Respondent agrees, as petitioner states, that a motion for a rehearing of the decision was denied and that the mandate of the Supreme Court of Arizona to the lower court issued on July 14, 1959, which gave finality to the decision.

JURISDICTION

Petitioner asserts jurisdiction under Title 28, Section 1257, United States Code, and Rule 38 of this Court.

HOW FEDERAL QUESTION IS RAISED

Petitioner questions the constitutionality o Arizona Revised Statutes (1956) § 13-822. The statute is copied in Appendix A of the Petition for Writ of Certiorari. Petitioner asserts that the statute contravenes the "due process of law" clause of the 14th Amendment to the Constitution of the United States, § 1, which provides:

" • • • nor shall any state deprive any person of life, liberty or property, without due process of law."

Petitioner states (p. 2, last paragraph) that the statute:

> " * * * does not establish a reasonable standard of guilt, and either forbids or requires the doing of acts in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."

Petitioner asserts that in the respect claimed the statute violates the constitutional provision invoked.

QUESTION PRESENTED FOR REVIEW

Petitioner further asserts that the statute invoked does not establish a reasonable standard of guilt, and either forbids or requires the doing of acts in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, and for such reasons petitioner claims the statute offends the due process clause of the 14th Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was convicted of contributing to the delinquency of a minor female in violation of the statute above referred to by encouraging a seventeen-year-old girl to allow motion pictures to be taken of her in the nude. The applicable statutes are set forth in the opinion of the Supreme Court of the State of Arizona as follows:

> "A.R.S. § 13-822, states as follows:
>
> 'A person who by any act, * * * encourages * * * delinquency of a child, as defined by § 13-821, * * * is guilty of a misdemeanor.'
>
> A.R.S. § 13-821, Subsection C. defines 'delinquency' as:
>
> ' * * * any act which tends to debase or injure the morals, health or welfare of a child.' "

Following the quotations, the decision continued:

> "These two sections, taken together, serve to prohibit the encouragement of any act which tends to debase or injure the morals, health or welfare of a child.
>
> Appellant's argument, that the statute is not violated unless the 'encouragement' is so pronounced as to constitute an

'aiding or abetting', has no application in this case. The evidence shows that appellant participated directly in encouraging the commission of the acts in question. This is all that the statute requires. * * * "

Petitioner's objection in the state Court to the statute involved was stated by the Supreme Court of Arizona as follows:

"Appellant's third assignment of error is that the conviction is void, since the statute under which it was obtained is violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States, for the reason that the statute fails to establish a standard of guilt and fails to prescribe the conduct which is prohibited. Appellant argues that a conviction could be obtained for the doing of any act which might, at the moment, be in accordance with the notions of a judge or juries as to what was injurious to the morals, health, or welfare of a child. * * * "

That argument, as the decision of the Supreme Court of the State of Arizona discloses, was previously repudiated in *Loveland* v. *State*, 53 Ariz. 131, 86 P.2(d) 942. However, the petitioner invoked the subsequent decision of this Court in *Mussur* v. *State of Utah*, 333 U.S. 95, 68 S.Ct. 397, 92 L.Ed. 562. The Supreme Court of Arizona distinguished the Mussur decision because the Utah statute there construed was completely dissimilar to the statute here involved.

REASONS FOR DENYING THE WRIT

The Supreme Court of Arizona, as shown above, has twice sustained the statute as against the contention that the statute fails to establish a standard of guilt and fails to intelligently describe the conduct which is prohibited.

I

Leaving for the moment the federal constitutional question, this Court will accept the construction placed upon the statute by the Supreme Court of the State of Arizona, and, as construed by that Court, the statute, contrary to the assertion of petitioner, does establish a reasonable standard of guilt, and does not forbid or require the doing of acts in terms so vague that men of common

intelligence must necessarily guess at the meaning of the statute and differ as to its application. In *Morehead* v. *New York ex rel Tipaldo*, 298 U.S. 587, this Court said:

> " * * * This court is without power to put a different construction upon the state enactment from that adopted by the highest court of the State. We are not at liberty to consider petitioner's argument based on the construction repudiated by that court. The meaning of the statute as fixed by its decision must be accepted here as if the meaning had been specifically expressed in the enactment. Supreme Lodge, K. P. v. Meyer, 265 U.S. 30, 32, 68 L.ed. 885, * * * "

The Supreme Court of Arizona, by its decision, considered and disposed of petitioner's claim that the conviction is void because the statute under which it was obtained violates the due process clause of the 14th Amendment to the Constitution of the United States. The conviction may stand notwithstanding the asserted constitutional objection because the state Court, by its opinion, and by a previous opinion, has held that the statute does not fail to establish a standard of guilt and does not fail to describe the conduct which is prohibited. Thus the Supreme Court of Arizona has twice decided, contrary to the assertion of petitioner, that the statute is not so vague that an offense may not be charged and prosecuted under it.

II

The decision of the Supreme Court of Arizona rests in part on a non-federal question, which in itself is sufficient to support its decision, regardless of the federal constitutional question decided. This Court in *Flournoy* v. *Wiener*, 321 U.S. 253, addressing itself to the question said:

> "Any determination which we might make of the Fifth Amendment question would thus leave unaffected the state court's judgment brought here for review. Our opinion on that subject would be advisory only, since there is nothing before us on which we could render a decision that would have any controlling effect on the rights of the parties. Hence the case stands in the same posture as those in which we have repeatedly held that where the judgment of a state court rests in part on a non-federal ground adequate to support it, this Court will

not consider the correctness of the decision which the state court also made of a federal question otherwise reviewable here. Berea College v. Kentucky, 211 U.S. 45, 53, 53 L.ed. 81, 85, 29 S.Ct. 33; Enterprise Irrig. Dist. v. Farmers Mut. Canal Co. 243 U.S. 157, 163, 164, 61 L.ed. 644, 648, 649, 37 S.Ct. 318; Lynch v. New York, 293 U.S. 52, 54, 55, 79 L.ed. 191-193, 55 S.Ct. 16; Fox Film Co. v. Muller, 296 U.S. 207, 210, 211, 80 L.ed. 158-160, 56 S.Ct. 183. In such a case this Court has said that it will not enter 'a useless and profitless reversal' 'where the same judgment will be rendered by the court below, after they have corrected the error in the federal question.' Murdock v. Memphis, 20 Wall (US) 590, 634, 635, 22 L.ed. 429, 443, 444."

CONCLUSION

Respondent respectfully suggests that this Court does not have jurisdiction to review the decision of the Supreme Court of Arizona brought in question by the petitioner herein, because:

1. The construction of the state statute of the Supreme Court of Arizona will be accepted by this Court, the effect of which is that the statute as construed by the highest court of the State of Arizona is in direct conflict with the construction which petitioner requests this Court to place upon the statute.
2. The decision of the highest court of the State of Arizona rests in part on a non-federal ground adequate to support the decision independent of the constitutional objection raised by the petitioner.

It is respectfully urged that the petition for writ of certiorari be denied.

Respectfully submitted,

LESLIE C. HARDY
Chief Assistant
Attorney General
of the
State of Arizona
108 Capitol Building
Phoenix, Arizona
Counsel for Respondent

WADE CHURCH
The Attorney General
FRANKLIN K. GIBSON
Assistant Attorney General
OF COUNSEL